IDB Interactive Sdn Bhd v Online E-Club Management Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-194–05 OF 2018
ONG CHEE KWAN JC
1 JULY 2019

Civil Procedure — Discovery — Discovery of documents — Defendant applied for discovery of documents — Whether defendant failed to plead issue of ownership of discovery documents — Whether scope of delivery too wide and oppressive — Whether discovery documents obtained commercially sensitive information — Rules of Court 2012 O 24 r 7

There was an application by Yap Tet Soon ('the fourth defendant') for specific discovery under O 24 r 7 of the Rules of Court 2012 ('the Rules'). The plaintiff entered into an agreement ('the distributorship agreement') with the first defendant wherein the plaintiff was appointed as the first defendant's exclusive reseller to distribute, market and sell certain online gaming products, merchandise and broadband contents ('the E-Club products') in five regions namely Indonesian, Vietnam, Philippines, Cambodia and Brunei ('the five regions'). There was disagreement on the precise role of the first, second and third defendants in relation to the operation of the plaintiff. It was related to the use of an online platform known as the E-Club Store which was owned by the first defendant but operated by the second defendant and subsequently by the third defendant. That platform was accessible by customers form the five regions to purchase the E-Club products under the distributorship agreement. The defendant's case was that the plaintiff was not privy to sales and purchases between the customers and the first defendant. The fourth defendant was appointed to provide payroll, financing and accounting services to the plaintiff. The plaintiff claimed that all and or most of the business, financial and management information and records pertaining to the plaintiff were wholly within the possession, custody and control of the defendants. The plaintiff contended that the fourth defendant had unlawfully continued to retain information and documents belonging to the plaintiff or had intentionally failed or refused to deliver up or disclose the information or documents to the plaintiff. The plaintiff claimed that the fourth defendant dealt with the information and documents in a manner inconsistent with the rights of the plaintiff and with the intention of depriving the plaintiff as the owner of the said information and records. The fourth defendant's main defence to the plaintiff's claim was that the E-Club transactions documents were belonging to the first, second and the third defendant. The fourth defendant sought the discovery of the discovery document to demonstrate that the plaintiff's

auditors had given access to the E-Club transactions document but only upon request made to the first defendant and its related companies and with their consent. For the objections of defendant's discovery application, the plaintiff contended that the issue of ownership of discovery documents had never been raised or pleaded by the fourth defendant. The plaintiff also contended that the defendant's application was nothing more than a fishing expedition for commercially sensitive information which were not and ought not to be in the public domain. The plaintiff also contended that the scope of the discovery was too wide and was oppressive.

Held, allowing defendant's application under encl 70 with costs of RM5,000:

(1) It was not necessary for the fourth defendant to plead the facts regarding the auditors were given access to the E-Club transaction documents in previous years before the fourth defendant was entitled to seek the discovery of the discovery documents. It would suffice once it could be demonstrated that the documents sought for were relatable to the matters or issues raised in the pleadings and which might either directly or indirectly enabled the fourth defendant to either advance his own case or to damage the plaintiff's case or which might fairly led to a train of inquiry which might have either of those two consequences. What was claimed in the statement of claim was that the plaintiff was unable to comply with its financial obligations because the fourth defendant refused to deliver up the E-Club transaction documents to its auditors. The discovery documents would establish whether it was indeed true that the cause for the auditors' inability to prepare the 2017 was due to the fourth defendant's conduct. It was not about the plaintiff's failure to file its account for 2017 but more about the cause or reason for the same (see paras 40 & 42–43).

(2) There was no merit for the contention that the scope of the discovery sought was too wide and oppressive. The scope of the discovery application was confined only to the communications between specified parties and for a specified subject matter namely the annual audits of the plaintiff's account for the years of 2015–2017. The plaintiff was not unable to understand or identify the specific documents sought for by the fourth defendant. It was wholly permissible for the fourth defendant to describe a class of documents (see paras 44–45).

(3) The plaintiff failed to show how the records of communication with the plaintiff's external auditors on the audit of the plaintiff's accounts were commercially sensitive. The point that the production of the documents would prejudice the plaintiff because they contain commercially sensitive information was never raised in the plaintiff's affidavit. If there was indeed such commercially sensitive information as contended, the applicable portions in the documents could be easily redacted. There was

no dispute that the discovery documents came within the definition of documents and that they were within the plaintiff's possession, custody and control (see paras 46–49).

[Bahasa Malaysia summary

Ini adalah permohonan oleh Yap Tet Soon ('defendan keempat') untuk penzahiran spesifik di bawah A 24 k 7 Kaedah-Kaedah Mahkamah 2012 ('Keadah-Kaedah tersebut'). Plaintif telah memasuki suatu perjanjian ('perjanjian pengedaran') dengan defendan pertama di mana plaintif dilantik sebagai penjual eksklusif kepada defendan pertama untuk mengedarkan, memasarkan dan menjual produk tertentu permainan dalam talian, barangan dan kandungan jalur lebar ('produk E-Club') di lima negara iaitu Indonesia, Vietnam, Filipina, Kemboja dan Brunei ('lima negara tersebut'). Terdapat perselisihan faham berkenaan dengan peranan sebenar defendan pertama, kedua dan ketiga berhubung dengan operasi plaintif. Ia berkaitan dengan penggunaan platform dalam talian yang dikenali sebagai kedai E-Club yang dimiliki oleh defendan pertama tetapi dikendalikan oleh defendan kedua dan seterusnya oleh defendan ketiga. Platform itu boleh diakses oleh pelanggan daripada lima buah negara untuk membeli produk E-Club sepertimana perjanjian pengedaran. Kes defendan adalah bahawa plaintif bukanlah privi kepada penjualan dan pembelian antara pelanggan dan defendan pertama. defendan keempat telah dilantik untuk menyediakan gaji, pembiayaan dan perkhidmatan perakaunan kepada plaintif. Plaintif mendakwa bahawa kesemua dan atau sebahagian besar perniagaan, maklumat kewangan dan pengurusan serta rekod yang berkaitan dengan plaintif adalah dalam pemilikan, penjagaan dan kawalan defendan. Plaintif menghujahkan bahawa defendan keempat telah menyalahi undang-undang dengan terus menyimpan maklumat dan dokumen yang dimiliki oleh plaintif atau dengan sengaja telah gagal atau enggan menyerahkan atau mendedahkan maklumat atau dokumen kepada plaintif. Plaintif mendakwa bahawa defendan keempat mengendalikan maklumat dan dokumen dengan cara yang tidak konsisten dengan hak plaintif dan dengan niat untuk menafikan plaintif sebagai pemilik maklumat dan rekod tersebut. Pembelaan utama defendan keempat kepada tuntutan plaintif adalah bahawa dokumen urus niaga E-Club adalah milik defendan pertama, kedua dan ketiga. Defendan keempat memohon penzahiran dokumen untuk membuktikan bahawa juruaudit plaintif telah memberikan akses kepada dokumen urus niaga E-Club tetapi hanya atas permintaan yang dibuat kepada defendan pertama dan syarikat-syarikat yang berkaitan dan dengan persetujuan mereka. Bagi bantahan permohonan penzahiran oleh defendan, plaintif menghujahkan bahawa isu pemilikan dokumen penzahiran tidak pernah dibangkitkan atau diplidkan oleh defendan keempat. Plaintif juga berpendapat bahawa permohonan defendan tidak lebih daripada 'fishing expedition' untuk maklumat sensitif komersial yang bukan dan tidak sepatutnya berada dalam domain awam. Plaintif juga berpendapat bahawa skop penemuan itu terlalu luas dan menindas.

Diputuskan, membenarkan permohonan defendan di bawah lampiran 70 dengan kos RM5,000:

(1) Ianya adalah tidak perlu bagi defendan keempat untuk memplidkan fakta mengenai juruaudit yang diberi akses kepada dokumen urus niaga E-Club pada tahun-tahun sebelumnya sebelum defendan keempat berhak untuk memohon penzahiran dokumen tersebut. Adalah memadai apabila ia dapat menunjukkan bahawa dokumen-dokumen yang dicari adalah berkaitan dengan perkara-perkara atau isu-isu yang dibangkitkan dalam pliding dan yang mana sama ada secara langsung atau tidak langsung membolehkan defendan keempat sama ada membuktikan kesnya sendiri atau merencatkan kes plaintif atau yang mungkin cukup membawa kepada keterangan yang panjang yang mungkin membawa kepada dua akibat tersebut. Apa yang dituntut dalam pernyataan tuntutan ialah plaintif tidak dapat mematuhi kewajipan kewangannya kerana defendan keempat enggan menyerahkan dokumen transaksi E-Club kepada juruaudit. Dokumen penzahiran akan membuktikan sama ada benar sekiranya alasan keengganan juruaudit untuk menyediakan tahun 2017 adalah disebabkan oleh defendan keempat. Ia bukan mengenai kegagalan plaintif untuk memfailkan akaunnya untuk tahun 2017 tetapi lebih mengenai punca atau sebab yang sama (lihat perenggan 40 & 42–43).

(2) Tidak ada merit untuk menghujahkan bahawa skop penzahiran yang dipohon adalah terlalu luas dan menindas. Skop permohonan penzahiran tersebut hanya tertumpu kepada komunikasi antara pihak-pihak tertentu dan untuk hal perkara tertentu iaitu audit tahunan akaun plaintif untuk tahun 2015–2017. Plaintif tidak dapat memahami atau mengenal pasti dokumen-dokumen tertentu yang dipohon oleh pihak defendan keempat. Ia adalah sepenuhnya dibenarkan bagi defendan keempat untuk menggambarkan sesuatu kelas dokumen (lihat perenggan 44–45).

(3) Plaintif gagal menunjukkan bagaimana rekod komunikasi dengan juruaudit plaintif mengenai pengauditan akaun plaintif adalah sensitif secara komersil. Perkara bahawa pengeluaran dokumen-dokumen tersebut akan memprejudiskan plaintif kerana ianya mengandungi maklumat sensitif komersial tidak pernah dibangkitkan dalam afidavit plaintif. Sekiranya terdapat maklumat sensitif komersial seperti yang dipertikaikan, bahagian-bahagian yang berkenaan dalam dokumen boleh dengan mudah dibuang. Tidak ada pertikaian bahawa dokumen penzahiran di dalam definisi dokumen tersebut dan bahawa ianya berada dalam pemilikan, jagaan dan kawalan plaintif (lihat perenggan 46–49).]

Cases referred to

Compagnie Financiere du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, CA (refd)

Kuah Kok Kim and others v Ernst & Young [1996] 3 SLR 485, CA (refd)

Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (T/A JB International) [1989] 1 SLR 1182, HC (refd)

Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia [2008] 3 MLJ 625; [2008] 5 CLJ 42, CA (refd)

Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd [2003] 1 SLR 75; [2002] SGHC 247, HC (refd)

Wu Siying & 75 Ors v Malaysian Airline System Bhd & Ors [2016] 11 MLJ 549; [2016] 8 CLJ 740 (refd)

Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (refd)

Legislation referred to

Companies Act 2016
Rules of Court 2012 O 24 r 7

Daniel Joseph Albert (Edmund Chek with him) (Daniel & Wong) for the plaintiff.
Richard Kok (Rhiza & Richard) for the first, second and third defendants.
Elaine Yap (Elaine Yap Law Office) for the fourth defendant.

Ong Chee Kwan JC:

[1] This decision is made pursuant to an application by the fourth defendant for specific discovery under O 24 r 7 of the Rules of Court 2012 ('the Rules').

[2] The specific documents that the fourth defendant is seeking the discovery of are set out in the schedule to its notice of application under encl 70. These are:

(a) correspondence, minutes of meetings and all other records of communications between the directors of the plaintiff, and the external auditors of the plaintiff in respect of the annual audit of its accounts for the years 2015, 2016 and 2017;

(b) correspondence, minutes of meetings and all other records of communication between finance personnel at IDimension Consolidated Bhd, acting as agents or representatives of the directors of the plaintiff, and the external auditors of the plaintiff in respect of the annual audit of its accounts for the years 2015, 2016 and 2017; and

(c) internal correspondence, minutes of meetings and all other records of communications between Daniel Boo Hui Siong, Stephen Ng min Lin,

and Foo Mei Tee as directors of the plaintiff in respect of the annual audit of its accounts for the years 2015, 2016 and 2017. ('the discovery documents')

[3] After hearing oral submissions from counsel and considering the relevant cause papers, I allowed the fourth defendant's application with costs. Not being satisfied with my decision, the plaintiff has appealed against the decision. Hence the grounds below.

BACKGROUND

[4] The plaintiff in its statement of claim seeks the following reliefs from the defendants, including the fourth defendant:

(a) an injunction to restrain the first, second, third and fourth defendants and each of them by themselves, their servants or agents or otherwise howsoever from dealing in any way with all documents and information belonging to the plaintiff which are in the possession, custody or power of the first, second third and fourth defendants including, inter alia, all documents listed in Annexure A;

(b) an order that within seven days from the date of this order, the first second, third and fourth defendants deliver up to the plaintiff all originals and copies of all documents and information belonging to the plaintiff which are in the possession, custody or power of the first, second, third and fourth defendants;

(c) an order that within seven days from the date of this order, the first, second, third and fourth defendants deliver up to the plaintiff all originals and copies of all documents listed under Annexure A;

(d) damages to be assessed;

(e) costs; and

(f) further and/or other reliefs as this honourable court deems fit and just.

[5] The documents in Annexure A are reproduced below:

ANNEXURE A

A. SALES	
1)	All documents, records and/or information in relation to the sales carried out for and/or on behalf of the Plaintiff during the financial years ending 2013 to 2017 ('Relevant Period') including but not limited to:-

	a) all purchase orders from customers including the e-commerce system (www.eclubstore.com) ('eClubStore') customers and/or resellers, which comprises of payment gateway providers, cybercafés, gaming stores and convenience stores appointed to distribute and sell Valve's products to consumers in Indonesia, Vietnam, Philiphines, Cambodia and Brunei ('5 Regions') ['Appointed Resellers'];
	b) all sales invoices and delivery orders issued on behalf of the Plaintiff;
	c) details of all such sales including but not limited to the product name, quantity and unit price of the products sold on behalf of the Plaintiff;
	d) all credit notes given or issued on behalf of the Plaintiff;
	e) all debit notes given by customers including eClubStore customers and/or Appointed Resellers;
	f) all proof of delivery and acknowledgements of receipt of the products sold to the eClubStore customers and/or Appointed Resellers.
	g) all payment remittance slips/advices for sales;
	h) all official receipts issued on behalf of the Plaintiff; and
	i) all communication and/or correspondence with customers.
B. PURCHASES	
1)	All documents, records and/or information in relation to the purchases carried out for and/or on behalf of the Plaintiff during the Relevant Period including but not limited to:-
	a) purchases orders and purchases confirmations issued on behalf the Plaintiff;
	b) details of all such purchases including but not limited to the product name, quantity and price of the products purchases on behalf of the Plaintiff;
	c) delivery orders issued by the suppliers;
	d) acknowledgement of receipts of products purchased on behalf of the Plaintiff; and
	e) all communication and/or correspondences with purchasers during the Relevant Period.
C. APPOINTED RESELLERS	
1)	All documents in relation to the appointment of all Appointed Resellers during Relevant Period, including but not limited to the following:-
	a) all agreement in relation to the appointment of each of the Appointed Resellers and/or details of the terms af all agreements reached with the Appointed Resellers;
	b) all details of the Appointed Resellers including business registration numbers, business addresses, correspondence addresses, contact details including but not limited to telephone numbers, facsimile numbers, email addresses and contact persons; and
	c) all communication and/or correspondences with the Appointed Resellers during the Relevant Period

('the E-Club transactions documents')

[6] The relevant facts for the purposes of determining encl 70 are set out below.

[7] Sometime on 22 May 2013, the plaintiff entered into an agreement with the first defendant ('the distributorship agreement') wherein the plaintiff was appointed as the first defendant's exclusive reseller to distribute, market and sell certain online gaming products, merchandise and broadband contents ('the E-Club products') in five regions, namely, Indonesia, Vietnam, Philippines, Cambodia and Brunei ('the five regions').

[8] There is disagreement on the precise roles of the first, second and third defendants in relation to the operation of the plaintiff. This has to do with, inter alia, the use of an online platform known as the 'eClubStore' which is owned by the first defendant but operated by the second defendant and subsequently the third defendant.

[9] The eClubStore is the platform accessible by customers from the five regions to purchase the E-Club products under the distributorship agreement. The defendants' case is that the plaintiff is not privy to sales and purchases between these customers and the first defendant for the E-Club products. The plaintiff, on the other hand, is asserting that such sales and purchases were made through the eClubStore on its behalf. Whatever the case maybe, there is no dispute that the plaintiff was credited for these sales and or purchases.

[10] The fourth defendant was appointed to provide payroll, financing and accounting services to the plaintiff.

[11] In the statement of claim, the plaintiff claims that all and or most of the business, financial and or management information and records pertaining to the plaintiff were wholly within the possession, custody and or control of the defendants.

[12] Sometime on 13 November 2017, the fourth defendant issued a notice terminating the contract of services between the fourth defendant and the plaintiff. At the same time, the fourth defendant also issued a letter to the plaintiff handing over what the fourth defendant claimed were the financial and accounting records of the plaintiff which were required for the performance of the fourth defendant's functions. These included the company stamps, cheque books and tokens.

[13] The plaintiff however contended that the fourth defendant has unlawfully continued to retain information and or documents belonging to the plaintiff and or has intentionally failed and or refused to deliver up or disclose this information and or documents to the plaintiff despite demands for the

same. The plaintiff claimed that the fourth defendant has dealt with the information and documents in a manner inconsistent with the rights of the plaintiff and with the intention of depriving the plaintiff as the owner of the said information and records. These are the E-Club transactions documents. They pertain to the sales and purchases by the customers from the five regions of the E-Club products via the eClubStore.

[14] The plaintiff further contended that the fourth defendant, by his aforesaid conduct, has intentionally impeded and or obstructed the plaintiff from properly and or fully complying with their financial reporting obligations under the law and its obligations to retain their financial records and information under the provisions of the Companies Act 2016 ('the CA'). It is also alleged that the fourth defendant has obstructed the plaintiff from taking over its business and operations which had caused and will continue to cause significant loss and damage to the plaintiff's business and reputation.

THE FOURTH DEFENDANT'S GROUNDS FOR ENCL 70

[15] The fourth defendant's main defence to the plaintiff's claim is that the E-Club transactions documents, insofar where they pertain to records of sales and purchases of customers from the five regions via the eClubStore operated by the second defendant and subsequently the third defendant, are documents belonging to the first defendants and or the second defendant and the third defendant.

[16] The fourth defendant states in his defence that he had notified the plaintiff that he did not maintain for and on behalf of the plaintiff such records of sale and purchase transactions. The plaintiff was not a party to the transactions between the eClubStore and the customers but was merely given credits for the same.

[17] In short, the fourth defendant has put into issue the ownership of the E-Club transactions documents. Indeed, one of the agreed issues to be tried filed by the parties is 'whether the Plaintiff owns the Annexure A Documents'.

[18] Given that the issue involves the ownership of the E-Club transactions documents, the fourth defendant is seeking the discovery of the discovery documents to demonstrate at the trial that the plaintiff's auditors had in the past been given access to the E-Club transactions documents but only upon request made to the first defendant and its related companies and with their consent.

[19] The fourth defendant said that the discovery documents would show that the plaintiff and or its auditors were at all times fully aware that there were

two sets of accounting records, namely, the transactions between eClubStore and its customers which are the E-Club transactions documents that belong to the first defendant and its related companies and the accounting records which comprised quarterly summaries which accounted for the sales and purchases of the E-Club products via the eClubStore which were credited to the plaintiff that belong to the plaintiff. In other words, the plaintiff and its auditors had in the past treated the E-Club transactions documents as not belonging to the plaintiff.

[20] Learned counsel for the fourth defendant further submitted that the discovery documents would also show that the plaintiff's compliance with its financial reporting obligations in 2017 was never impeded by reason of a lack of access to the E-Club transactions documents which were accessible for audit but not for the taking.

[21] Based on the aforesaid contentions, learned counsel for the fourth defendant submitted that the three essential elements needed to justify an application for discovery as set out in *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581 have been amply satisfied. These elements are:

(a) there must be a 'document';

(b) the document must be 'relevant'; and

(c) the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

[22] To further buttressed her position, learned counsel for the fourth defendant referred to the following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (T/A JB International)* [1989] 1 SLR 1182 that was cited with approval in *Wu Siying & 75 Ors v Malaysian Airline System Bhd & Ors* [2016] 11 MLJ 549; [2016] 8 CLJ 740:

> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matter in question in the action. What are the matters in question would depend on the pleadings. *A document relates to the matter in question in the action if it contains information which may — not which must — either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences*: see *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QDB 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196 at p 210. (Emphasis added.)

[23] Learned counsel for the fourth defendant submitted that an order for production of the discovery documents is justified because these documents would lead the fourth defendant to a train of inquiry which would have either directly or indirectly enable the fourth defendant to advance his own case or to damage the plaintiff's case against him. For this, the following passage from *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 which has been endorsed by our Court of Appeal in *Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia* [2008] 3 MLJ 625; [2008] 5 CLJ 42 was cited.

> it seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because, as it seems to me, *a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences*. ... (Emphasis added.)

THE PLAINTIFF'S OBJECTIONS

[24] The plaintiff resisted the fourth defendant's application for discovery on grounds that the discovery documents are irrelevant and that the application is nothing more than a fishing expedition for commercially sensitive information which are not and ought not to be in the public domain. It is further suggested that the scope of the discovery is too wide and is oppressive.

[25] On the point of relevance, learned counsel for the plaintiff submitted that the issue of ownership has never been raised or pleaded by the fourth defendant. According to learned counsel for the plaintiff, the main issue in dispute between the plaintiff and the fourth defendant is whether the fourth defendant has continued to possess documents, records and or information belonging to the plaintiff after the fourth defendant's termination of its service contract with the plaintiff on 13 November 2017.

[26] Further, the documents requested are for all communication between the plaintiff and or its holding company, IDimension Consolidated Bhd ('ICB') with its external auditors from the years 2015–2017. Learned counsel for the plaintiff argued that the issue of ICB's involvement or alleged non-compliance dating back to 2015 has never been raised or pleaded.

[27] Learned counsel for the plaintiff contended that the issue as to whether the plaintiff had been precluded from complying with its financial reporting

obligations can be easily determined vide a simple search with the Companies Commission of Malaysia for the plaintiff's audited financial statements for 2017.

[28] Finally, learned counsel for the plaintiff submitted that the discovery documents contain commercially sensitive information that ought not to be disclosed to the public. This is particularly so given that the plaintiff is a subsidiary of a public listed company. In support, a passage in the Singapore High Court case of *Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75; [2002] SGHC 247 was cited:

> 6. In my view, I would hold that a 'fishing expedition' in the context of discovery refers to the aimless trawling of an unlimited sea. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes to drop a line (or two), I would not regard that as a 'fishing expedition'. But I would myself prefer to approach such applications strictly on the basis of the broader relevancy test.

[29] Learned counsel for the plaintiff concluded by stating that the fourth defendant has not discharged his burden of showing that the production of the discovery documents is necessary for the fair disposal of this case.

THE COURT'S DECISION

[30] From the perusal of the pleadings, it is apparent that the fourth defendant's main defence to the plaintiff's claims is that the E-Club transactions documents do not belong to the plaintiffs. This is clear from para 20(c) of the defence which states:

> (c) The fourth defendant has notified the Plaintiff that he does not maintain for or on behalf of the Plaintiff, any records of sales transactions of Steam Wallet Keys for the purposes of his finance and accounting services, as these belong to E-Club Interactive and E-Club HK and are furnished to him only upon request by the Directors of the Plaintiff.

[31] As pointed out by learned counsel for the fourth defendant, the plaintiff is fully aware of the issue of 'ownership' of the E-Club transactions documents. This specific issue is identified as one of the agreed issues to be tried.

[32] Further, the fourth defendant in para 7(b) of his defence has stated that the plaintiff was given credits for the sales of the steam wallet keys transacted vide the online platform operated by the second defendant and after 2016 by the third defendant.

[33] This is further elaborated in the fourth defendant's affidavit of 7 March 2019 (encl 69) filed in support of encl 70 where the fourth defendant stated at

A para 6 that 'the Plaintiff was not a party to the transactions recorded in the E-Club Documents with customers and suppliers. It was only party to the back-to-back transaction with the first to third Defendants in a temporary arrangement pending the Plaintiff's set up of its own distribution channels'.

B **[34]** In para 20 of the fourth defendant's defence, it is the fourth defendant's case that the E-Club transactions documents were accessible to the plaintiff. At para 7 of encl 69, the fourth defendant averred as follow:

> 7. Since I started book keeping for the Plaintiff, the first to third Defendants have accounted for sales which were credited to the Plaintiff through quarterly summaries, which were then audited by the Plaintiff's external auditors who had access to the E-Club Documents by request and with the consent of the first to third Defendants. The Plaintiff's directors and auditors have always recognised that this is because they belong to the first to third Defendants.

C

D **[35]** It is instructive to heed the observation of Edward Bray in his highly regarded work on discovery as to the test of 'materiality' where he says this:

> ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

E

[36] Starting from the aforesaid, I will approach this application on the assumption that the fourth defendant's claim that the ownership of the E-Club transactions documents does not belong to the plaintiff as true.

F

[37] Based on this assumption, I will now consider if the discovery documents sought by the fourth defendant is material or relevant for the fourth defendant to either directly or indirectly advance his case or to damage the plaintiff's case.

G

[38] The communications between the directors of the plaintiff with the auditors with respect to the annual audit of its accounts for the years 2015–2017 may disclose an express or implied acknowledgment by the directors of the plaintiff that the E-Club transactions documents whilst accessible to its auditors, do not belong to the plaintiff. They may also show a pattern of conduct that for the purposes preparing the plaintiff's financial audited reports, only access was given to the auditors of the E-Club transactions documents but never possession of the same.

H

I **[39]** Looking from this perspective, I can see and appreciate the relevance of the discovery documents to the fourth defendant's case. The documents do indeed relate to matters in question raised in the pleadings and they are likely to throw some light on the case if produced. The communication between the

plaintiff and its auditors and also among the plaintiff's directors regarding the annual audit of the plaintiff's financial accounts for the year 2015–2017 may lead to a train of inquiry on the plaintiff's treatment or understanding of the E-Club transactions documents vis a vis its ownership.

[40] I do not think that it is necessary for the fourth defendant to plead the facts regarding the auditors being given access to the E-Club transactions documents in previous years before the fourth defendant is entitled to seek the discovery of the discovery documents. It will suffice once it can be demonstrated that the documents sought for are relatable to the matters or issues raised in the pleadings and which may either directly or indirectly enable the fourth defendant to either advance his own case or to damage the plaintiff's case or which may fairly lead to a train of inquiry which may have either of those two consequences (see *Wu Siying & Ors v Malaysia Airline System Bhd & Ors* [2016] 11 MLJ 549 at p 552; [2016] 8 CLJ 740 at p 743).

[41] With regard to learned counsel for the plaintiff's contention that the application for discovery is unnecessary because the fourth defendant could have easily conducted a CCM search on the plaintiff which will immediately show that the plaintiff did not file any audited accounts for 2017, with respect, this misses the point.

[42] What is claimed in the statement of claim is that the plaintiff is unable to comply with its financial obligations because the fourth defendant has refused to deliver up the E-Club transactions documents to its auditors.

[43] The discovery documents will establish whether it is indeed true that the cause for the auditors' inability to prepare the 2017 audit was due in any way to the fourth defendant's conduct. It is not about the plaintiff's failure to file its accounts for 2017 but more about the cause or reason for the same.

[44] Regarding the contention that the scope of the discovery sought for is too wide and is therefore oppressive, I also find no merits at all in the same. The scope of the discovery application is confined only to communications between specified parties and for a specified subject matter, namely, the annual audits of the plaintiff's accounts for the years 2015–2017.

[45] Learned counsel for the plaintiff has not shown that the plaintiff is unable to understand and or identify the specific documents that would come within the scope of the documents sought for by the fourth defendant. It is wholly permissible for the fourth defendant to describe a 'class of documents'. Support for this can be found in the Singapore Court of Appeal case of *Kuah Kok Kim and others v Ernst & Young* [1996] 3 SLR 485 at p 494, para 37 where the court held that:

A As long as the appellants described the type or class of documents with reasonable precision, and that class of documents were relevant to the cause or intended cause of action, that would be enough. They need not go to describe and name each and every such document specifically. Indeed, it would be unreasonable and impossible for the appellants to do so. Thus, we agree with the trial judge that the appellants' affidavit had complied with (a) and (b) of O 24 r 7A(3).

B

[46] Learned counsel for the plaintiff has also not shown how the records of communication with the plaintiff's external auditors on the audit of the plaintiff's accounts are 'commercially sensitive'. These documents are *historical* documents going back at least one year. There is no issue of 'insider information' that learned counsel for the plaintiff had contended.

C

[47] In any case, this point that the production of the documents will prejudice the plaintiff because they contain 'commercially sensitive' information was never raised in the plaintiff's affidavit.

D

[48] Also, if there is indeed such commercially sensitive information as contended, the applicable portions in the documents can be easily redacted.

E

[49] There is no dispute that the discovery documents come within the definition of 'documents' and that they are within the plaintiff's possession, custody and control.

F

[50] Accordingly, for the reasons above, I grant the fourth defendant's application under encl 70 with costs fixed at RM5,000. I have ordered for the plaintiff to produce the documents within 14 days from the date of the order. In case there is any issue pertaining to the redaction of the documents, the parties may come before the court for directions.

G

Defendant's application under encl 70 allowed with costs of RM5,000.

Reported by Mohd Kamarul Anwar

H

I